



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

October 24, 2008

The Honorable Ben Ysursa  
Idaho Secretary of State  
**STATEHOUSE MAIL**

Re: Certificate of Review  
Proposed Initiative Petition Regarding Legal Tender in  
Payment of Debts

Dear Secretary of State Ysursa:

A proposed initiative petition ("Initiative") was filed with your office on September 11, 2008, and received by this office on September 25, 2008. Pursuant to Idaho Code § 34-1809, this office has reviewed the Initiative and has prepared the following advisory comments. Please know that, under the review statute, the opinions expressed in this review pertain only to the legal issues raised by the Initiative. This office offers no opinion regarding any policy issues raised by it. Furthermore, the Attorney General's recommendations are "advisory only", and Petitioners are free to "accept or reject them in whole or in part."<sup>1</sup>

**BALLOT TITLE**

Following the filing of the initiative petition, this office will prepare short and long ballot titles. The ballot titles are required by law to impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While this office prepares titles, if Petitioner would like to propose language in line with these standards, we recommend that he do so. Any proposed language will be carefully considered.

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<sup>1</sup> Idaho Code § 34-1809.

## MATTERS OF SUBSTANTIVE IMPORT

### Introduction

Entitled "The Jubilee Initiative Petition", the Initiative seeks to make gold or silver coins the only legal tender acceptable for the payment of debt within the State of Idaho. Petitioner seeks to:

1. Make "null and void" all contracts with financial institutions denominated in currencies not redeemable in gold or silver;
2. Make all fines, debts, settlements, or liens unenforceable unless denominated in gold or silver coins;
3. Make taxes payable in only gold or silver coins or in tax certificates issued by the taxing authority; and
4. Require the state legislature to establish depositories for the certification and circulation of gold and silver coins, to issue tax certificates, and create all needful rules and regulations "for orderly compliance with the Constitution."

### Congress, Not The States, Determines What Is Legal Tender

Citing Article 1, § 10, of the United States Constitution, the Initiative declares that only gold and silver coin will be legal tender in Idaho.

Art. 1, § 10, of the U.S. Constitution is binding on the state of Idaho.<sup>2</sup> It imposes limitations upon the states and provides, in relevant part:

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; *make anything but gold and silver coin a tender in payment of debts*; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

(Emphasis added.)

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<sup>2</sup> See McCulloch v. State of Maryland, U.S. (4 Wheat.) 316 (1819).

Art. 1, § 10, while it prohibits states from coining money and restricts their right to make anything but gold and silver coin tender, imposes no such limitation upon Congress. The Constitution, in fact, gives Congress the sole power to decide how the moneyed transactions between citizens should be regulated.<sup>3</sup> Art. 1, § 8, cl. 5, of the U.S. Constitution declares that Congress shall have the power “[t]o coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.” It is this section, wrote a federal district court in the case Nixon v. Phillipoff,<sup>4</sup> that gives Congress the *exclusive* ability to determine what will be legal tender throughout the country. Nixon, a *pro se* plaintiff, brought an action against Phillipoff, who had filed a mortgage foreclosure action against his property and the clerk of court who had accepted Phillipoff’s filing fee, which he paid in Federal Reserve notes. One of Nixon’s arguments for dismissal was that Phillipoff had violated Art. 1, § 10, of the U.S. Constitution because he paid the foreclosure filing fee with Federal Reserve notes instead of “lawful money” (i.e., gold and silver coin). Nixon asserted that § 10 requires a state to accept and recognize *only* gold and silver coin as legal tender, which is also Petitioner’s position. The court stated that Nixon’s interpretation of § 10 would, in effect, declare Federal Reserve notes illegal, creating an inconsistency with Art. 1, § 8, cl. 5. The court observed that:

[t]he power to coin money necessarily carries with it the power to declare what is money, and the constitution does not limit Congress to gold and silver coin. Section 8 sets forth the powers of Congress, while § 10 imposes a restriction on the states. It strains logic and constitutional interpretation to claim that the framers of the constitution sought to limit Congress’ power to coin money via an implication derived from a restriction directed not at Congress but at the states.”<sup>5</sup>

Congress, the court observed, has the unrestricted power to declare what is and is not legal tender or, stated another way, what a creditor must accept as payment of a debt. Art. 1, § 10, acts only to remove from states their inherent sovereign power to declare currency.<sup>6</sup> Because Congress has declared, through federal statute, that Federal Reserve notes are legal

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<sup>3</sup> See Ogden v. Saunders, 25 U.S. 213 (1827).

<sup>4</sup> 615 F.Supp. 890 (D.C.Ind, 1985).

<sup>5</sup> 615 F.Supp 890, 893.

<sup>6</sup> Id.

tender, states must accept them as such.<sup>7</sup> Citing numerous federal cases that originate from the U.S. Supreme Court Legal Tender Cases of the 1800s to support its conclusion, the court concluded that Nixon's position was illogical and flew in the face of established legal precedent.<sup>8</sup>

It was in the Legal Tender Cases that the U.S. Supreme Court explained the purpose of § 10.

The Constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over States and people. It was designed to provide the same currency, having a uniform legal value in all the States. It was for this reason the power to coin money and regulate its value was conferred upon the federal government, while the same power as well as the power to emit bills of credit was withdrawn from the States. *The States can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress.*<sup>9</sup>

(Emphasis added.)

Several years before the Legal Tender Cases were heard by the U.S. Supreme Court, the Supreme Court of the Territory of Idaho considered the issue. In the 1867 case of Haas v. Misner, the Idaho Territory Supreme Court concluded that taxes were debt within the meaning of federal law and any state law that required taxes to be paid only in gold or silver coin, or its equivalent, was null and void.<sup>10</sup> The court observed that state laws that contravene "either by grafting limitations on or exceptions to the provisions of an act of congress" are invalid. The court noted that:

[t]he constitutionality of the act of congress authorizing the issuance of these [Treasury] notes and making them a "legal tender in the payment of all debts, public and private," has been affirmed by too many of the tribunals of last resort in

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<sup>7</sup> See 31 U.S.C. § 5103.

<sup>8</sup> 615 F.Supp. 890, 894.

<sup>9</sup> Idaho Op. Atty. Gen. No. 82-12 citing Legal Tender Cases, 79 U.S. (12 Wall) 457, 545 (1871). Pronouncements on legal tender reaffirmed in Legal Tender Cases, 110 U.S. 421 (1884).

<sup>10</sup> 1 Idaho 170 (1867).

many of the states of this Union to be now considered an open question . . . .<sup>11</sup>

The Haas case was followed two years later by Crutcher v. Sterling, a case in which an Idaho sheriff sued the Territorial Treasurer, claiming that, under territorial statute, he was entitled to be paid in gold from the prison fund.<sup>12</sup> The court disagreed, holding that the sheriff had to accept payment in legal tender notes.

Ninety-five years later, in the case Herald v. State, an Idaho plaintiff questioned whether he could lawfully pay his taxes using Federal Reserve Notes as currency.<sup>13</sup> He argued that Art. 1, § 10, of the U.S. Constitution precluded payment in anything but gold or silver coin. Predictably, the court stated that § 10 “was intended only to limit a state’s authority to create its own form of legal tender other than gold or silver.” Addressing the plenary authority of Congress over currency of the United States, the court quoted the U.S. Supreme Court in the Legal Tender Cases, which said:

Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.<sup>14</sup>

Applying the legal authority cited above leads inexorably to the conclusion that the State of Idaho has no authority to declare what shall and shall not be legal tender in this state. That is the sole responsibility of Congress. Consequently, the declaration that only gold and silver coin shall be legal

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<sup>11</sup> Id.

<sup>12</sup> 1 Idaho 306 (1869).

<sup>13</sup> 107 Idaho 640, 691 P.2d 1255 (Idaho App., 1984).

<sup>14</sup> 107 Idaho 640 quoting The Legal Tender Cases, 110 U.S. 421, 448 (1884).

tender is unconstitutional and should be removed from the Initiative. Since the Initiative's objectives spring from the legally flawed premise that the State of Idaho may determine legal tender, it follows that:

1. The clause that makes "null and void" all contracts with financial institutions denominated in currencies not redeemable in gold or silver should be removed. Legal tender is what must be accepted by creditors in satisfaction of all debt. Additionally, it is likely that a court would find such a provision unconstitutional on the additional ground that voiding such contracts would result in an impermissible burden upon Congress' constitutional authority to regulate commerce.<sup>15</sup>
2. Because of Congress' peremptory authority to determine legal tender, the clause making all fines, debts, settlements, or liens unenforceable unless denominated in gold or silver coins is unconstitutional and should be removed.
3. The clause requiring taxes to be paid in legal tender is constitutional as long as it is Congress that establishes legal tender.<sup>16</sup> The permissibility of allowing taxes to be paid with tax certificates is difficult to determine since the term "tax certificate" is not a commonly understood term, but rather a technical one, which is undefined in the Initiative and in the Idaho Code. The use of tax certificates to pay taxes is a concept that will require fuller development so that the provision is not void for vagueness. Petitioners may consider a separate initiative dealing with payment of taxes to avoid running afoul of the Unity of Subject and Title requirement of the Idaho State Constitution.<sup>17</sup>
4. In the Initiative's final clause directing that the State Legislature create rules and regulations "for orderly compliance with the Constitution", Petitioner should specify that it is to the U.S. Constitution to which the word "Constitution" refers. Assuming

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<sup>15</sup> See U.S. Const. Art. 1, § 8, cl. 3.

<sup>16</sup> See Herald v. State, 107 Idaho 640 (Idaho App., 1984), wherein the court observed that a statute requiring that property taxes be paid in lawful money of the United States did not unconstitutionally create a new form of legal tender.

<sup>17</sup> Idaho Const., Art. III, § 16, requires that "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."

that the reference is to the U.S. Constitution, Art. 1, § 10, the limitations imposed upon the states by this section require no state rule and regulation to effect compliance. The final sentence of the Initiative is therefore needless surplusage and should be struck. Moreover, it is likely that a court would find the requirement that the Legislature certify legal tender unconstitutional, given Congress's exclusive authority over the currency.

### **MATTERS OF FORM**

The format and style of the Initiative does not conform to Idaho Statutes. It is unclear if the Initiative is to form one statute or more than one.

Petitioner should review Idaho Code § 34-1801A and use it as a guide to draft the Initiative so that it substantially follows the form prescribed by law. This statute requires that initiatives be preceded with a "WARNING", stating that it is a felony for anyone to sign the petition with a name other than their own or to knowingly sign the petition more than once or to sign if not a qualified elector. A section entitled "INITIATIVE PETITION" should follow the "WARNING" and should include a demand by petition signers that the proposed initiative be submitted to voters at a regular general election and a certification of their residence and their status as qualified electors. The Initiative lacks these elements.

Additionally, Idaho Code § 34-1804 requires that "[e]ach signature sheet shall contain signatures of qualified electors from only one (1) county." Petitioner's signature sheets contain the signatures of persons from multiple counties.

Finally, Idaho Code § 34-1807 requires that each sheet of every petition contain a notarized affidavit from the person who circulated the petition, which states that he/she is an Idaho State resident at least 18 years old, that he/she believes that each petition signer is an elector qualified to sign the petition, and which includes the circulator's post-office address.

### **CERTIFICATION**

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to Petitioner via a copy of the

Secretary of State Ysursa  
October 24, 2008  
Page 8 of 8

Certificate of Review, deposited in the U.S. Mail to James W. Stivers, 1435  
Desmet Road, Desmet, ID 83824.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Wasden", with a stylized flourish at the end.

LAWRENCE G. WASDEN  
ATTORNEY GENERAL

Analysis by: Mitchell E. Toryanski  
Deputy Attorney General